

ARE SCHOLARSHIP ATHLETES AT BIG-TIME PROGRAMS REALLY UNIVERSITY EMPLOYEES?—YOU BET THEY ARE!

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The “athletic scholarship”¹ is fundamental to the modern American “amateur”² sports milieu. The athlete, by accepting the scholarship, enters into a legal relationship with the particular educational institution which grants the award. This relationship typically requires the athlete to maintain certain grade levels and to perform athletically for the school in return for tuition, books, and certain other educational expenses. This paper explores how courts treat this relationship when the student-athlete is injured and tries to recover against the school under local workers’ compensation laws. The general rule is that no recovery is available unless the claimant is an “employee” of the school. Thus, the key issue in such litigation is whether scholarship athletes are “employees” for workers’ compensation purposes. Although the courts are generally split on this issue, this paper will argue that the better reasoned opinions are those holding that scholarship-athletes are employees for purposes of the workers’ compensation statutes, and further that the cases holding that athletes are not employees cling to an outdated conception of amateurism. The problem with this traditional approach is that, as a practical matter, it leaves injured scholarship-athletes without a remedy. It is argued here that the realities of “amateur” sports in America compel the conclusion that scholarship athletes are really employees. This paper also explores the implications of that conclusion. If scholarship athletes are employees, are they really “amateurs?” Is a system which depends so heavily on the athletic scholarship really an amateur sports system? Finally, what are the other legal ramifications of coming to grips with the fact that our scholarship athletes are not really “amateurs?”

A BRIEF GENERAL NOTE ABOUT WORKERS’ COMPENSATION

Every American jurisdiction has adopted some type of workers’ compensation scheme. Generally, these schemes make the employer strictly lia-

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1. It has been suggested that the term “athletic scholarship” is a classic example of an oxymoron.

2. The crucial factor distinguishing the amateur athlete from the professional athlete is that the amateur pursues athletic activity as an avocation while the professional participates vocationally. Thus, the NCAA defines an amateur as “one who engages in a particular sport for the educational, physical, mental and social benefits derived therefrom and to whom participation in that sport is an avocation.” NAT’L COLLEGIATE ATHLETIC ASS’N CONST. art. 3 § 1 (1983). Institutions which govern amateur athletics in the United States (like the NCAA, the Amateur Athletic Union, and the United States Olympic Committee) all have rules defining “amateurism” along these lines and denying eligibility to those who fail to qualify as amateurs.

ble for an employee injury occurring within the scope of employment.³ An employee under the protection of such an act, in turn, agrees that the workers' compensation remedy is the sole redress available against his employer, thus waiving the right to pursue any legal action against the employer. The rationale for the imposition of strict liability in this context is that the employer is in the best position to bear the costs of such injuries. The theory is that injuries to workers are analogous to the breakage of equipment. Such losses are inherent in business and are appropriately viewed as a cost of production which will ultimately be passed on to the consumer.⁴

Workers' compensation statutes typically require that the employer secures insurance to cover the costs of such injuries. Insurance rates are often regulated by the state so that the burden is spread evenly over the entire industry.⁵ The failure to obtain insurance exposes the employer to both criminal sanctions, and civil suits in which the employer is deprived of common law defenses of contributory negligence and assumption of risk.⁶

In most workers' compensation schemes, the injured employee's measure of damages is limited. Although the injured employee is usually entitled to receive full compensation for medical expenses, the other items of tort damages, such as disfigurement, are statutorily constrained. Only a percentage of the average weekly wages for the period of the disability can be recovered.⁷ The amount of recovery for disfigurement is statutorily prescribed or determined by a workers' compensation board.⁸

Workers' compensation schemes reflect a kind of bargain between employers and employees. The terms of the bargain are that employees give up their rights to pursue common law claims (with the promise of full recovery, but also with the danger of no recovery) in exchange for certain, limited recovery under the workers' compensation act. The employer, in turn, relinquishes common law defenses and in return enjoys the assurance that damage awards will be limited. In deference to this common sense bargain, most courts tend to liberally construe workers' compensation laws thereby bringing as many cases as is reasonably possible under the law in order to give meaning to the act's humane purposes and remedial character.⁹

3. "Workmen's compensation is . . . a form of strict liability. The employer is charged with the injuries arising out of his business, without regard to any questions of his negligence, or that of the injured employee." W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 531 (1971).

4. E. BLAIR, *REFERENCE TO WORKMEN'S COMPENSATION LAWS* 1-2 (1974).

5. The state legislatures have virtually removed the normal competition among insurance carriers in the workers' compensation field in order to achieve an economical solution to coverage. Thus, by one of several methods the extreme risks are spread among all the carriers thereby providing possible coverage for all industries. Some states have produced this effect by requiring insurance carriers to cover extreme risks or give up writing workers' compensation insurance within the state; while others have allowed the insurance companies to determine among themselves the best way to describe the risks. *Id.* at 1-1, 20-3.

6. *Id.* at 20-1.

7. Since the overall purpose of the workers' compensation acts is to fairly compensate the injured employee for his loss of earning power, state legislatures have tried to include within the act itself formulas to determine average wages. Some states use an average weekly wage method or average monthly or even average annual method to determine a just compensation for the injured employee. However, to prevent the employee from receiving a net financial gain due to his injury, the statutes generally provide for the employee to get his average after-tax wage. *Id.* at 12-1 to 12-10.

8. *Id.* at 10-1, 11-1.

9. *Id.* at 1-1.

THE MATRIX OF RELEVANT CASES

Assume that a scholarship-athlete is injured or killed in the course of participation in a collegiate sport—not an entirely uncommon occurrence. Should the injured scholarship-athlete or the administrator of his estate be entitled to recover benefits under workers' compensation laws? Four reported cases now bear heavily on this question—*University of Denver v. Nemeth*,¹⁰ *State Compensation Insurance Fund v. Industrial Commission*,¹¹ *Van Horn v. Industrial Accident Commission*,¹² and *Rensing v. Indiana State Board of Trustees*.¹³ This is an issue of current vitality and it is foreseeable that this question will arise in other jurisdictions as well.¹⁴

A. *Nemeth*

Nemeth was a regularly enrolled student in the College of Business Administration at the University of Denver during the 1949-50 academic year. He was also a football player. Although he did not have a "scholarship," he received \$50 per month from the university for cleaning the campus tennis courts. In lieu of payment for his housing, Nemeth took care of the dormitory furnace and cleaned the sidewalks near the dorm. In the spring of 1950, Nemeth suffered a back injury during spring football practice.

Nemeth went before the Industrial Commission,¹⁵ claiming that he was employed to play football at the University and that his injury arose out of

10. 127 Colo. 385, 257 P.2d 423 (1953).

11. 135 Colo. 570, 314 P.2d 288 (1957) (hereinafter cited as *Dennison*).

12. 219 Cal. App. 2d 457, 33 Cal. Rptr. 169 (1963), cite noted in 11 UCLA L. REV. 645, 646 (1964).

13. 437 N.E.2d 78 (Ind. App. 1982), *rev'd*, 444 N.E.2d 1170 (Ind. 1983).

14. The Michigan Court of Appeals, in a case similar to *Rensing's* applied an "economic reality" test to determine if an employment relationship existed. The court considered the following factors in holding that no employer-employee relationship existed: the employer's right to control the employee's activities, the employer's right to discipline or fire the employee, the payment of wages, particularly the extent to which the employee depends upon these wages for his daily living expenses, and whether the task performed by the employee was an integral part of the employer's business.

The court found that the employer's right of control and power to discipline the employee was very limited. The payment of wages, however, favored the finding of an employment relationship. The final factor, whether the employee's duties were integral to the employer's business, weighed heavily against finding an employment relationship, since the defendant university's primary business was education. *Coleman v. Western Mich. Univ.*, 125 Mich. App. 35, 336 N.W.2d 224 (1983) (per curiam). Nebraska considered a bill in their legislature which would require amateur athletes to be treated as employees of the University of Nebraska entitling them "to the same rights and benefits as other university employees." CHRON. OF HIGHER EDUC., Jan. 26, 1983, at 17, col. 1. The bill's proponent, State Senator Ernest Chambers, believes that such a plan would remove the hypocrisy of the present situation by no longer forcing players, coaches and athletic directors to pretend that the players are amateur athletes brought to the university to receive an education when they are in fact providing the university with a big business that makes millions of dollars. *Id.* Senator Chambers echoed such thoughts when he appeared on television in a discussion concerning the advisability of athletes being university employees on the *Phil Donahue Show* where he claimed that "[w]e are living in a fantasy world pretending that big-time athletes are being educated" when the sole purpose for their being brought to the university is to raise revenue for the institution by playing football. *Id.*, Jan. 11, 1984, at 25, col. 1.

15. The Industrial Commission was at the time the statutorily mandated workers' compensation hearing agency in Colorado. The names of such boards vary from state to state. Their powers, however, are similar in every state. Such boards determine whether the claimant is an employee within the meaning of the act, whether the injury occurred during the course of the employment and the appropriate measure of damages.

that employment. He was successful before the Industrial Commission. On appeal, the district court affirmed the Commission. The Colorado Supreme Court affirmed, and held that Nemeth was an employee who was injured in the course of his employment and was thus entitled to workers' compensation benefits.¹⁶

The Colorado Supreme Court opinion turned on the fact that Nemeth's job depended on his football performance:

It appears from the record that Nemeth was informed by those having authority at the University, that 'it would be decided on the football field who receives the meals and the jobs.' He participated in football practice, and after a couple of weeks a list of names was read, which list included Nemeth's name, and he was then given free meals and a job. One witness said: 'If you work hard (in football), you got a meal ticket.' Another testified that, 'the man who produced in football would get the meals and a job.' The football coach testified that meals and the job ceased when the student was 'cut from the squad.'¹⁷

The court went on to observe that Nemeth was in fact an employee whose injury arose out of his employment stating that "an injury arises out of the employment if it arises out of the nature, conditions, obligations or the incidents of the employment; in other words, out of the employment looked at in any of its aspects."¹⁸ The court also reasoned that "[i]t has been repeatedly held in this state, and in every other jurisdiction, that the Workmen's Compensation Act must be liberally construed to give effect to its purposes."¹⁹

It should be noted that *Nemeth* is not a typical case in that the athlete was not a scholarship recipient. However, *Nemeth* is important because it indicates judicial willingness to examine the real nature of the relationship

16. *Nemeth*, 127 Colo. at 399, 257 P.2d at 430.

17. *Nemeth*, 127 Colo. at 390, 257 P.2d at 426. It often appears that coaches, as a group, are more open about the scholarship-in-exchange-for-performance reality than any other group connected with the athletes. Some thirty years after *Nemeth*, an equally honest coach at the University of North Dakota caused a stir when he reduced the financial aid of his basketball players because of their performance on the basketball court. Coach David Gunther, after suffering his first losing season in 13 years, said that "I think a scholarship is *earned*, and that players should be expected to do what the coach asks them. This is nothing new. It's gone on before and it will go on again. I don't see what all the fuss is about. It just amazes me." The players, on the other hand, had somewhat different feelings about the incident. Rodney Merriam, a junior, had his entire scholarship withdrawn, leaving him and his teammates with a dim understanding of what college athletics is all about. Left bitter by the situation, he stated that, "there was no indication that performance would be a factor. It's almost like a professional atmosphere, at no time did I ever believe it would be that way." Mr. Merriam went on to explain what he believed the coach's motive to be, "[h]e's been winning for 12 years or so, and suddenly this team just can't seem to jell. So he makes a big grandstand move like this one. I feel kind of like a scapegoat." A second dropped student, freshmen Steven Snyder, "was surprised that they treat it so much like a business" and expressed concern about a coach's ability to reduce aid to students if they are more concerned with athletic growth rather than academic growth. For a full account of the North Dakota affair, see Vance, *I Guess I Understand It, Says Player Who Lost Aid*, CHRON. OF HIGHER EDUC., May 18, 1983, at 1, col 2 [hereinafter cited as Vance] (emphasis in original). Finally, this attitude can be seen by coaches at established sport powerhouses as evidenced by a recent comment by Georgetown University basketball coach John Thompson, who stated "I don't know of anybody who gives room, board and tuition to anyone who can't play." Stieg, *College Basketball*, SPORTS ILLUSTRATED, Feb. 6, 1984, at 87.

18. *Nemeth*, 127 Colo. at 391, 257 P.2d at 426, quoting *Caswell's Case*, 305 Mass. 500, 502 (1940).

19. *Nemeth*, 127 Colo. at 391, 257 P.2d at 426.

between a student athlete and the university or college for which he plays. If the athlete is in fact being compensated *because* of his athletic performances, he is most accurately viewed as an employee for workers' compensation purposes. This kind of *quid pro quo* arrangement is the earmark of the employee-employer relationship.²⁰

B. *Dennison*

A scant four years later, the Colorado Supreme Court confronted the same issue.²¹ Billy Dwade Dennison was employed at a gas station when the football coach at Fort Lewis A & M College approached him about playing football. Dennison was unwilling to give up the income from the filling station job, but a deal was struck with the university. He was employed by the college to manage the student lounge and the work on the college farm. For this work, he was paid the regular student rate and also received an athletic scholarship which operated as a tuition waiver. His work schedule was arranged to accommodate his football related activities. On the first play of a game in September of 1955, Dennison received a fatal head injury.

Dennison's widow was awarded death benefits by the Industrial Commission and that award was affirmed by the district court. In a curious and poorly reasoned one and one-half page opinion, the Colorado Supreme Court reversed the judgment and remanded to the district court with directions to enter an order dismissing the claim. The court distinguished *Nemeth* by stating, "[t]he distinction is at once apparent. In [*Nemeth*], claimant's employment as a student worker depended wholly on his playing football, and it is clear that if he failed to perform as a football player he would lose the job provided for him by the university."²² Dennison, on the other hand, did not receive his benefits in consideration of his athletic performance. The court felt that none of Dennison's consideration was in return for playing football. The court also believed that the plaintiff had failed to show that the contract for hire was dependent upon his playing football or that such employment would have changed or ceased if he had not engaged in football activities.²³

The case shows judicial disingenuousness at best. Surely it is accurate

20. This observation is made by J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* 12-15 (1979) [hereinafter cited as WEISTART & LOWELL] who pointed out that: "[w]here there is evidence that the performance of athletic services is the *quid pro quo* for the aid then the athlete may well be an employee for workmen's compensation purposes. Inasmuch as employment status would be inimical to one's status as an amateur athlete—that is, if one were an 'employee' in the sense of performing athletic services in return for financial aid, then he or she would almost certainly violate the institutional definitions of amateur . . . and would require the institution to expend substantial resources for workmen's compensation insurance."

21. *Dennison*, 135 Colo. 570, 314 P.2d 288.

22. *Id.* at 573, 314 P.2d at 292. This conclusion was startling in light of other testimony offered by the coach that he convinced Dennison to leave his gas station job to play football: "Ray wanted to play football and he had a job in town at a filling station that would require more time. I asked him if he could get a job that would make him as much as he made at the filling station . . . would he play football and he said 'yes.'" *Id.*

23. The court did add that "it is significant that the college did not receive a direct benefit from the activities, since the college was not in the football business and received no benefit from this field of recreation." *Id.* One wonders why Fort Lewis A & M fielded a football team if "no benefit" was received. The court is perhaps suggesting that a different result would be forthcoming under similar facts involving a "big-time" program.

to say that Dennison, like Nemeth, received university benefits in exchange for participation in football. These two cases cannot be distinguished in any meaningful way despite such an attempt by the court.

C. *Van Horn*

Edward Van Horn was a star athlete in high school. The football coach of California State Polytechnic College (hereinafter referred to as Cal Poly) recruited Van Horn to play football, and promised him a job on campus. Van Horn enrolled at Cal Poly in September, 1956, and played football during the fall term. He lived on campus and worked in the college cafeteria. In the summer of 1957, he got married and decided not to play football.

In the spring of 1958, he returned to the team for spring practice, after the coach promised him that he would receive assistance from the college in the amount of "\$50.00 at the beginning of each school quarter and \$75.00 rent money during the football playing season."²⁴ Van Horn told his father that he had decided to play football again because he had been offered "a pretty good deal . . . to support his family."²⁵ Thereafter, he received his checks in a timely fashion. The \$50.00 checks contained the notation: "Scholarship."²⁶ The \$75.00 payments had no such notation and came from the coach's discretionary fund. Van Horn continued to play football through the 1958, 1959 and 1960 seasons and received his checks on a regular basis. In October of 1960, he was killed in an airplane crash while returning from a game.

Following Van Horn's death, his widow and minor children applied for death benefits under California's Workmen's Compensation Act. The Industrial Accident Commission²⁷ denied the application, concluding that Van Horn was not an employee rendering services within the meaning of the act. The California appellate court reversed the Commission, concluding that the Commission's findings were not supported by the evidence.²⁸

The court reasoned that it was irrelevant whether Van Horn considered himself to be an employee.²⁹ It also held that the form of remuneration was immaterial.³⁰ The court looked beyond the form to the substance of the relationship and found that Van Horn was being paid to play football.³¹ The beneficial purposes of workers' compensation law buttressed this conclusion. Thus, the evidence in *Van Horn* clearly established the existence of a contract of employment.

The court in *Van Horn* returned to principles first proposed in *Nemeth*, that where there is a contractual relationship between the university and the student whereby the student will receive financial assistance in return for participating in a prescribed athletic activity, the student-athlete will be considered an employee for workers' compensation purposes. However, similar

24. *Van Horn*, 219 Cal. App. 2d at 461, 33 Cal. Rptr. at 171.

25. *Id.*

26. *Id.*

27. This is the name of California's workers' compensation board. *See supra* note 4.

28. *Van Horn*, 219 Cal. App. 2d at 464, 33 Cal. Rptr. at 174.

29. *Id.*

30. *Id.* at 466, 33 Cal. Rptr. at 174.

31. *Id.*

results will not be achieved where the court views the student as an "amateur" athlete simply engaged in athletic competition as an avocation.

D. *Rensing*

The most notable modern case on the issue of whether a student-athlete is covered by workmen's compensation is *Rensing v. Indiana State University Bd. of Trustees*.³² On February 4, 1974, Indiana State University offered Fred Rensing a football scholarship. The terms of the scholarship were contained in a "financial aid agreement"³³ and a "tender of financial assistance."³⁴ In general, the agreement gave Rensing a grant for tuition fees,

32. 437 N.E.2d 78 (Ind. App. 1982), *rev'd*, 444 N.E.2d 1170 (Ind. 1983).

33. *Id.* at 80, n.2. Rensing's scholarship is not dissimilar in form and substance to those generally awarded. In relevant part, the financial aid agreement provided:

This is to certify that Indiana State University will award you an educational grant if you meet the academic requirements of Indiana State University and the National Collegiate Athletic Association.

Your grant will consist of the following: Tuition Fees; Room and Board; and Book Allowance for a period of One Year.

This award may be renewed each year for a total of four years as long as you are academically qualified and abide by acceptable conduct standards.

In the event that you incur an injury, during supervised conduct of your sport, of such severity that the doctor-director of your student health service deems it inadvisable for you to continue to participate, this grant will be continued for as long as you are otherwise eligible for competition. In this instance, Indiana State University will ask you to assist in the conduct of the athletic programs within the limits of your physical capabilities.

34. *Id.* at 80 n.3. The tender of financial assistance provided in relevant part:

This is to advise you that the committee on student financial aid has awarded you an Athletic Grant-In-Aid as described below. . . .

The award is made in accordance with the rules of this institution and the applicable provisions of the Constitution and Bylaws of the National Collegiate Athletic Association (NCAA). Your acceptance means that you also accept these provisions and agree to abide by them.

The benefits of the award are effective August 1974 to May 1975.

A summary of the applicable rules of the NCAA are set forth on the reverse side of this form. Please read carefully.

1. In accepting this Tender of Financial Assistance, the recipient certifies:

(a) He is aware that any employment earnings during term time and any other financial assistance from any source other than that provided for in this award must be reported immediately to the Director of Athletics of the institution making the award.

(b) The aid provided in the Tender will be canceled if the recipient signs a professional sports contract or accepts money for playing in an athletic contest.

2. Financial aid may be awarded for any term or session during which the student-athlete is in attendance as a regularly enrolled undergraduate. The renewal of a scholarship or grant-in-aid award shall be made on or before July 1 prior to the academic year it is to be effective.

3. Maximum permissible financial aid may not exceed 'commonly accepted educational expenses'; i.e., tuition and fees, room and board, required course related supplies and books.

4. A student-athlete may not receive financial assistance other than that "administered by" the institution except that financial assistance may be received from anyone upon whom the student-athlete is naturally or legally dependent. (There is a special provision concerning financial aid awarded on bases having no relationship whatsoever to the recipient's athletic ability.)

5. When unearned financial aid is awarded to a student and athletic ability is taken into consideration in making the award, such aid combined with other aid the student-athlete may receive from employment during semester or term time, other scholarships and grants-in-aid (including governmental grants for educational purposes) and like sources, may not exceed commonly accepted educational expenses as defined in Paragraph 3 above. NCAA legislation permits limited exceptions to this requirement, most of which are related to military service benefits.

room and board and a book allowance for a single year. It also provided that if he was unable to compete because of injury the grant would be continued for as long as he was otherwise eligible for competition.

Rensing accepted the offer and "signed" on April 29, 1974. At the end of his first academic year, his scholarship was renewed for the 1975-76 year under substantially the same conditions. On April 24, 1976, Rensing was rendered a quadriplegic as a result of an injury during spring football practice.³⁵

Subsequently, on August 22, 1977, Rensing filed a claim under Indiana's Workmen's Compensation Act³⁶ seeking recovery for a permanent total disability and for medical and hospital expenses incurred as a result of the injury. After a hearing in February of 1979, an Industrial Board³⁷ member issued a finding against Rensing. The board held that the burden of proving that the claimant was an employee rested solely on the claimant, and in this instance, Rensing failed to sustain this necessary burden. As a result the plaintiff was allowed to take nothing on his claim.³⁸

Rensing, following the statutorily prescribed procedure, appealed first to the full Industrial Board, which affirmed in full the finding and order of the Hearing Member. He then appealed to the Indiana Court of Appeals, which reversed the Industrial Board in a 2 to 1 decision and remanded for a determination of benefits. The court of appeals majority decision reviewed both the relevant workers' compensation law principles and the matrix of relevant cases in reaching its conclusion, which was to be ultimately overturned by the Indiana Supreme Court.³⁹

The parties agreed that "some manner of contract existed between them."⁴⁰ The question was whether there was a "contract for hire or em-

Institutional aid MAY NOT BE GRADATED OR TERMINATED during the period of its award:

1. Because of the recipient's athletic ability or his contribution to a team's success.
2. Because of injury prevents the recipient from participating in athletics.

Institutional aid MAY BE GRADATED OR TERMINATED during the period of its award if the recipient:

1. Does not satisfy the stated institutional academic requirements for like scholarships or grants-in-aid.
2. Voluntarily renders himself ineligible for intercollegiate athletic competition.
3. Fraudulently misrepresents any information on his application, letter of intent or tender.
4. Engages in serious misconduct warranting substantial disciplinary penalty by the appropriate institutional committee or agency. (Serious misconduct means conduct of sufficient gravity that if comparable conduct occurred in other departments of the institution, similar substantial disciplinary penalty could properly be imposed. Serious misconduct includes manifest disobedience through violation of institutional regulations or established athletic department policies and rules applicable to all student-athletes.)

Such GRADATION OR TERMINATION of an award may occur if:

- The action is taken by the institution's regular disciplinary and/or awards authority.
- The student-athlete has had opportunity for a hearing.
- The action is based on institutional policy applicable to the general student body.

35. *Id.* at 79.

36. IND. CODE ANN. § 22-3-1-1 (Burns 1974).

37. The names of such administrative boards vary from state to state. In Indiana it is the Industrial Board of Indiana.

38. *Rensing*, 437 N.E.2d at 83.

39. *Rensing*, 444 N.E.2d 1170 (Ind. 1983).

40. *Rensing*, 437 N.E.2d at 83. See also *Taylor v. Wake Forest University*, 16 N.C. App. 117,

ployment"⁴¹ within the meaning of the workmen's compensation act. After noting that the proper scope of review compelled deference to the decision of the Industrial Board, the Indiana Court of Appeals nonetheless reversed the Board, finding that Rensing was in fact an employee within the meaning of the act. In so concluding, the court pointed out that the beneficent purposes of the act supported a liberal construction: "in applying the statutory definition of 'employee' . . . a *measure of liberality* should be indulged in . . . to the end that *in doubtful* cases an injured workman"⁴² is compensated.

The court's determination that the requisite employer-employee relationship existed rested on the definition of "employer" and "employee" found in the act. An employer was defined to include "the state, and any political subdivision, . . . any individual, firm, association or corporation . . . using the services of another for pay."⁴³ An employee was defined as "every person, including a minor, in the service of another, under any contract or hire or apprenticeship, *written or implied*, except one whose employment is both casual and not in the usual course of the trade, business, occupation or profession of the employer."⁴⁴ Viewing the evidence, the court found "the conclusion was inescapable,"⁴⁵ that the requisite relationship existed. Rensing and the university "bargained for an exchange in the manner of employer and employee of Rensing's football talents for certain scholarship benefits."⁴⁶

The court found that Rensing's employment was clearly more than "casual," and defined "casual work" as being work which is "not permanent nor periodically regular but occasional, and not in the usual course of the employer's trade or business. . . ."⁴⁷ The court further stated that there was no "hard and fast rule by which it can be clearly and unfailingly determined where to draw the line between employments which are casual and those which are not."⁴⁸ Thus, each case must be judged on its own merits. Rensing's employment, however, was obviously not casual because it was "periodically regular," even though it was not permanent:

The uncontradicted evidence revealed that for the team members, football is a daily routine for 16 weeks each year. Additionally, during the 'off season' the 'student-athlete' must daily work out to maintain his physical skills and attributes, thereby enhancing his eligibility for the team which is the basis for his scholarship.⁴⁹

Since Rensing's employment was not casual, it was not necessary to reach the question of whether the employment was "in the usual course of

191 S.E.2d 379 (1972), *cert. denied* 282 N.C. 307 (1972), holding that a football scholarship is a contractual arrangement.

41. *Rensing*, 437 N.E.2d at 83.

42. *Id.* at 84 (emphasis in original).

43. *Id.* quoting IND. CODE ANN. § 22-3-6-1(a) (Burns 1974).

44. *Id.* quoting IND. CODE ANN. § 22-3-6-1(b) (Burns 1974) (emphasis in original).

45. *Rensing*, 437 N.E.2d at 85.

46. *Id.* at 86. The court attached "no significance . . . to the Trustee's suggestion that one cannot be *both* a student and employee of an educational institution." The fact that Rensing did not see himself as a hired hand was similarly irrelevant. *Id.* at 86, n.7 (emphasis in original).

47. *Id.* at 88, quoting *Crabill v. Livengood*, 142 Ind. App. 624, 626, 231 N.E.2d 854, 855 (1967).

48. *Rensing*, 437 N.E.2d at 88, quoting *Lasch v. Corns*, 120 Ind. App. 31, 34, 89 N.E.2d 553, 555 (1950).

49. *Rensing*, 437 N.E.2d at 88.

trade." Nonetheless, the court made it clear that if it were to decide that question, it would find that "football competition must properly be viewed as an aspect of the University's overall occupation,"⁵⁰ sufficient to bring it within the "usual course of trade" of the university. In this regard, the court stated:

It is manifest from the record . . . that maintaining a football team is an important aspect of the University's overall business or profession of educating students. . . . Suffice it to say, it was uncontroverted that football specifically and athletes generally play a beneficial role in creating the desired educational environment at the University . . . [and that] the University has prospered athletically through nationally recognized intercollegiate teams.⁵¹

In his dissenting opinion, Judge Young stated that he did not believe that student-athletes are employees within the meaning of Indiana Workmen's Compensation Act, citing *Van Horn* as support for his belief. While he agreed that "a measure of liberality should be indulged,"⁵² Judge Young was of the opinion that the legislature did not intend that student-athletes be treated as employees. He further stated that although Rensing had indeed entered into a contract, it was not a "contract for hire as required by the Workmen's Compensation Act."⁵³ He relied upon *Dennison* and the principles adopted by the court for denying benefits. Finally, Judge Young reasoned that Rensing was not "in the service of" the trustees, as required by the act.⁵⁴

In reversing the court of appeals, the Supreme Court of Indiana agreed with Judge Young and reinstated the decision of the Industrial Board, holding that no employer-employee relationship existed between the student and the university on the basis of Rensing's receipt of a scholarship, and that Rensing was therefore not entitled to workmen's compensation benefits.⁵⁵

The supreme court first reasoned that since Rensing was appealing from a "negative judgment" of the Industrial Board, it would not disturb the lower court's findings unless the evidence is such that it "leads inescapably to a contrary result."⁵⁶ Even though workmen's compensation laws are to be "liberally construed," Rensing was properly denied benefits. The primary consideration was that Rensing and the university did not intend to enter into an employer-employee relationship:

It is clear that while a determination of the existence of an employee-employer relationship is a complex matter involving many factors, the primary consideration is that there was an intent that a contract of employment, either express or implied, did exist. In other words, there must be a mutual belief that an employer-employee relationship did exist. . . . It is evident from the documents which formed the agreement in this case that there was no intent to enter into a employee-employer relationship at the time the parties entered into the agreement.⁵⁷

50. *Id.* at 89.

51. *Id.*

52. *Id.* at 90, quoting *Schraner v. State Dep't of Corrections*, 135 Ind. App. 504, 510, 189 N.E.2d 119, 123 (1963).

53. *Rensing*, 437 N.E.2d at 90.

54. *Id.*

55. *Rensing*, 444 N.E.2d at 1175.

56. *Id.* at 1172.

57. *Id.* at 1173.

As evidence of this lack of intent, the court pointed to the fact that the National Collegiate Athletic Association (hereinafter referred to as NCAA) constitution and by-laws were incorporated by reference into Rensing's agreement. The constitution and by-laws clearly articulated the policy that intercollegiate sports are to be viewed "as part of the educational system and are clearly distinguished from the professional sports business."⁵⁸ Both Rensing and his parents signed the agreement—they therefore were deemed to have placed their imprimatur on the policy statement and to have understood that Rensing was a student-athlete and not an employee. Further, Rensing's benefits (tuition, room, board, fees and book allowance) were not considered "pay" by anyone concerned.⁵⁹ The university and the NCAA considered Rensing an eligible amateur. Rensing, however, did not consider the benefits as income since he did not report them for income tax purposes.⁶⁰

As further evidence of this lack of intent, the court noted that the Indiana General Assembly distinguished between awarding financial aid and hiring employees by specifically granting the power to grant aid to the Board of Trustees of state institutions.⁶¹ Furthermore, it found that the Indiana statute which directed employers to make contributions to the unemployment fund for "all individuals attending . . . school . . . who, in lieu of remuneration for . . . services, receive . . . meals, lodging, books [or] tuition" was not intended to cover Rensing because "Rensing was not working at a regular job for the University," since scholarship recipients are not considered to be employed by the university.⁶² Rather, "[they receive] benefits based upon their past demonstrated ability."⁶³ Thus, the court reasoned that it was apparent that neither the university, the NCAA, the IRS nor Rensing considered the scholarship to be income.⁶⁴ Rensing therefore could not be an employee within the meaning of the workers' compensation act.

Additionally, the court voiced approval of dissenting Judge Young's conclusion that Rensing was not "in the service of" the university, pointing out that other "[c]ourts in other jurisdictions have [held that individuals such] as student athletes, student leaders in student government associations and student residence-hall assistants are not 'employees' for purposes of workmen's compensation laws unless they are also employed in a university job in addition to receiving scholarship benefits."⁶⁵

According to the Indiana Supreme Court, the "facts [showed that] Rensing did not receive 'pay' for playing football within the meaning of the Workmen's Compensation Act."⁶⁶ Thus, "an essential element of the employer-employee relationship was missing in addition to the lack of in-

58. *Id.*

59. *Id.*

60. *Id.* "The Internal Revenue Service has ruled that scholarship recipients are not taxed on their scholarship proceedings . . ." citing Rev. Rul. 77-263, 1977-31 I.R.B. 8. See generally WEIS-TART & LOWELL, *supra* note 20, at 15-19.

61. *Rensing*, 444 N.E.2d at 1173.

62. *Id.* at 1174.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

tent."⁶⁷ Moreover, since Rensing's benefits could not be reduced or withdrawn because of his athletic failings or failure to contribute to the team's success, the employer's normal right of discharge was also missing.⁶⁸

The court concluded by stating that:

The evidence here shows that Rensing enrolled at Indiana State University as a fulltime student seeking advanced educational opportunities. He was not considered to be a professional athlete who was being paid for his athletic ability. In fact, the benefits Rensing received were subject to strict regulations by the NCAA which were designed to protect his amateur status. Rensing held no other job with the University and therefore cannot be considered an "employee" of the University within the meaning of the Workmen's Compensation Act.⁶⁹

The Indiana Supreme Court opinion in *Rensing* is deficient in a number of respects. At the outset, the court acknowledged the propriety of a liberal construction of the workers' compensation statute, and proceeded to apply a construction which was anything but liberal. But even if a liberal construction was not called for, the court's opinion invites criticism. The court's analysis of the intent of the parties raises a number of problems. The probable reality of the situation is that neither the athlete nor the institution granting the scholarship gave the employee-employer question much thought.⁷⁰ The holding, however, turns on the lack of a "mutual belief" concerning a matter that the parties, in all likelihood, did not consciously consider. In such a case, a better approach would have been to assess the nature of the relationship created by the contract, which is exactly what the court of appeals did when it concluded that Rensing was really an employee. After all, the court concluded, Rensing and the university "bargained for an exchange in the manner of employer and employee. . . ."⁷¹ The supreme court's conclusion that the requisite intent was lacking gives short shrift to the contractual relationship created by the scholarship, which is the best evidence of the intent of the parties.

At the same time, the court gave great weight to the fact that the NCAA constitution and by-laws were incorporated by reference into Rensing's contract. This agreement to incorporate, according to the court, is a clear manifestation of Rensing's intent not to be regarded as an employee for workers' compensation purposes. This is an unconvincing judicial stretch of the imagination. It is difficult to see how the intent of the parties, in incorporating these documents, without more, reflected agreement that Rensing was not to

67. *Id.*

68. *Id.*

69. *Id.* at 1175.

70. The Indiana Court of Appeals, in concluding that Rensing was an employee, attached "no significance . . . to the Trustee's suggestion that one cannot be both a student and employee of an educational institution." *Rensing*, 437 N.E.2d at 86. In support of their argument that Rensing was not an employee, the Trustees cited the following colloquy which occurred at trial:

Q. Fred, when you first applied at Indiana State University, was it your intention to apply for a scholarship, or was it your intention to apply for employment?

A. 'I just wanted to play ball. . . .'

Id. at 86 n.7.

The Supreme Court of Indiana made no reference to this testimony. Had the coach been asked whether it was his intention to give Rensing a scholarship or to employ him as a football player, he might well have answered along the same line, "I just wanted Rensing to play ball."

71. *Id.* at 86.

be treated as an employee for workers' compensation purposes. Similarly, the fact that the IRS does not consider a scholarship as taxable income does not necessarily mean that the recipient is not an employee for workers' compensation purposes.

To say that Rensing was not "in the service of" the university, and did not receive "pay" flies in the face of the plain meanings of those words, and that Rensing could not be discharged on the basis of performance is simply a misstatement of fact which contradicts common experience in the amateur sports setting.⁷²

ATHLETES AS EMPLOYEES

The litmus test of whether a college athlete should be considered an employee for workers' compensation purposes is the existence of a *quid pro quo* arrangement. When there is competent evidence presented that the student's performance of athletic services is given as consideration for financial aid, the courts should recognize the student's status as a student/employee.⁷³ *Nemeth* and *Van Horn* recognized the reality of this contractual relationship.

An objective appraisal of the relevant cases reveals that the better reasoned view is that the ordinary athletic scholarship does indeed create an employer-employee relationship. For a variety of unarticulated reasons—foremost among them the fear of unchartered waters—it is not surprising that the courts in the past have refused, and will in the future refuse, to hold that amateur athletes are really employees. It is an uncomfortable and unsettling realization that our scholarship athletes are really employees, but it is a conclusion which an honest appraisal compels. Moreover, a number of beneficial consequences will undoubtedly flow from this conclusion and contribute to the reform of a system which is in need of constructive change.

One immediate consequence of course is that athletes in Rensing's position will be compensated for athletic injuries. As things stand now, the uninsured Rensings on our college campuses can only recover for injuries suffered by either pursuing tort remedies or counting on the largess of the university community. The tort remedy will often be unavailable because of the absence of negligence. The availability of voluntary assistance is much too haphazard. The workers' compensation model is the obvious mechanism for granting relief.

Second, if scholarship athletes really are university employees, they are not "amateurs" as that term is commonly defined. To a certain extent this means that big-time college sports will be openly professionalized. In the eyes of many who have studied the current system, this would be a healthy development. The American Council on Education, for example, recently issued an internal report following a study of the American amateur sports system. The Council is a research group representing some 1400 colleges and universities. The Council, after noting the "corruption" rampant in ma-

72. Four University of North Dakota basketball players recently had their financial aid reduced because of their poor athletic performance. David Gunther, the team's coach, said that "athletic scholarships should be 'earned' by players, not just given to them for four years regardless of their performance on the playing court or field." Vance, *supra* note 17, at 1, col. 2.

73. WEISTART & LOWELL, *supra* note 20, at 12-13.

major college football and basketball programs, suggested that one solution is for the major college football and basketball powers to shed the facade of amateurism, pay athletes over the table and not even require them to be students. The report stated the situation was beyond the control of the NCAA. College presidents, according to the report, faced three options:

(a) A return to amateurism. (This option, however, was regarded as "not really viable" because of economic pressures and demands from alumni and other supporters for winning teams.);

(b) Continuing the present situation. (The Council noted that continuing the status quo meant drifting toward professionalism and an increased credibility gap between the pretenses of the student athlete model and the realities of money, corruption and professionalism.);

(c) An open move to professionalism. (This entails a situation where blue chip athletes would be paid a market wage rather than an artificially constrained amount with all the attendant pressures for under-the-table payments.).

The Council favored the third option.⁷⁴

Finally, this would create an environment where real amateurism could be reborn. Those schools not desirous of running professional teams could opt for a genuine amateur model (either by adopting the no scholarship division III method or by accepting a club sport program) and build organizations capable of being administered in a principled manner.

To the extent that the courts abdicate their responsibility to "call" things as they really must see them because of some unarticulated fear of the unknown, they contribute to the continuation of an admittedly corrupt system. Courts willing to honestly appraise the present relationships in American "amateur" sports must conclude that our big time college scholarship athletes are really employees. This honest appraisal in turn will lead to healthy reform.

74. AMERICAN COUNCIL ON EDUC. REP. (unpublished Internal Report). *See generally* CHRON. OF HIGHER EDUC., Sept. 14, 1983, at 24, col. 3. The American Council on Education's generalized interest in education has given rise to two committees which oversee collegiate athletic policy: the President's Committee on College Athletics and the more controversial Ad Hoc Committee. The American Council on Education has recently gained public attention by demanding a greater voice in college athletics much to the dismay of the NCAA.